

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF WASHINGTON

MICHELLE MARCUM,

Plaintiff,

v.

AMTRUST INSURANCE COMPANY
OF KANSAS,

Defendant.

NO: CV-11-5050-RMP

ORDER GRANTING
DEFENDANT'S MOTION TO
DISMISS

INTRODUCTION

Before the Court is the Defendant's Motion to Dismiss, ECF No. 17. The Court has reviewed the pleadings and the file and is fully informed.

BACKGROUND

On January 27, 2011, the Plaintiff, Michelle Marcum, brought this action in Benton County Superior Court alleging that Trinity Universal Insurance Company of Kansas ("Trinity") had failed to perform under an insurance contract. The claim arose from a fire at the West Richland Golf Course clubhouse and restaurant on December 30, 2008. In her complaint, Ms. Marcum sought monies allegedly owed

ORDER GRANTING DEFENDANT'S MOTION TO DISMISS ~ 1

1 under the insurance contract and reasonable attorney fees pursuant to the
2 Washington State Supreme Court's decision in *Olympic S.S. Co. v. Centennial Ins.*
3 *Co.*, 117 Wn.2d 37 (1991).

4 The Defendant, AmTrust Insurance Company of Kansas ("AmTrust"),
5 removed the action to this Court on the basis of diversity jurisdiction. AmTrust
6 also filed a motion to be properly identified as the defendant in light of its status as
7 Trinity's successor in interest. After being properly substituted in the caption,
8 AmTrust moved to dismiss Ms. Marcum's claim for attorney fees. ECF No. 17. In
9 support of its motion, AmTrust has filed a statement of undisputed material facts,
10 ECF No. 20, supported by two declarations, ECF Nos. 21, 22. Ms. Marcum has
11 not responded to AmTrust's motion.

12 **APPLICABLE LAW**

13 Under Rule 56, a "court shall grant summary judgment if the movant shows
14 that there is no genuine dispute as to any material fact and the movant is entitled to
15 judgment as a matter of law." Fed. R. Civ. P. 56(a). "A dispute about a material
16 fact is genuine 'if the evidence is such that a reasonable jury could return a verdict
17 for the nonmoving party.'" *FreecycleSunnyvale v. Freecycle Network*, 626 F.3d
18 509, 514 (9th Cir. 2010) (quoting *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242,
19 248 (1986)).

1 “The moving party initially bears the burden of proving the absence of a
2 genuine issue of material fact.” *In re Oracle Corp. Secs. Litig.*, 627 F.3d 376, 387
3 (9th Cir. 2010) (citing *Celotex Corp. v. Catrett*, 477 U.S. 317, 323 (1986)).
4 “Where the non-moving party bears the burden of proof at trial, the moving party
5 need only prove that there is an absence of evidence to support the non-moving
6 party’s case.” *Id.* (citing *Celotex*, 477 U.S. at 325). “Where the moving party
7 meets that burden, the burden then shifts to the non-moving party to designate
8 specific facts demonstrating the existence of genuine issues for trial.” *Id.* (citing
9 *Celotex*, 477 U.S. at 324).

10 In a case such as this one, where the non-moving party fails to respond to the
11 movant’s motion for summary judgment, the Court should inquire as to whether
12 the “movant’s papers are insufficient to support [the] motion or on their face reveal
13 a genuine issue of material fact.” *Henry v. Gill Indus., Inc.*, 983 F.2d 943, 950
14 (1993). However, if the record evidences no genuine issue of material fact and that
15 the movant is entitled to judgment as a matter of law, the Court should grant the
16 motion.

17 In *Olympic S.S.*, the Washington State Supreme Court held “that an award of
18 fees is required in any legal action where the insurer compels the insured to assume
19 the burden of legal action, to obtain the full benefit of his insurance contract,
20 regardless of whether the insurer's duty to defend is at issue.” 117 Wn.2d at 53.

1 The Washington State Court of Appeals has clarified that “an insured is entitled to
2 fees if compelled to take legal action to obtain the benefits under its insurance
3 contract, but not if the issue is merely a dispute about the value of the claim.”
4 *Solnicka v. Safeco Ins. Co. of Illinois*, 93 Wn. App. 531, 533 (1999) (citing
5 *Petersen v. United Servs. Auto, Ass’n*, 91 Wn. App. 212, 218 (1998)).

6 DISCUSSION

7 As an initial matter, it is uncontested in the record that Ms. Marcum was
8 served with requests for admission. ECF No. 22 at 2. It is also uncontested in the
9 record that Ms. Marcum failed to respond to the requests for admission within the
10 thirty days allowed by Fed. R. Civ. P. 36(a)(3). ECF No. 22 at 2. Accordingly, by
11 operation of that rule, Ms. Marcum is deemed to have admitted the requested
12 matters. Fed. R. Civ. P. 36(a)(3).

13 Based on the admissions, the record establishes that AmTrust has paid all of
14 the documented claims of Ms. Marcum relating to the December 30, 2008, fire up
15 to the policy limits. ECF No. 22 at 13-27. The record establishes that AmTrust
16 began adjusting this claim prior to commission of this lawsuit, and that AmTrust
17 did not dispute its duty to cover Ms. Marcum. ECF No. 21. Any disputes
18 evidenced by the letters and emails in the record could only be construed as
19 ensuring that there was sufficient information to establish the magnitude of the
20 loss. *See* ECF No. 21.

1 In short, based on the record before the Court, it appears that no lawsuit was
2 necessary to obtain benefits under the insurance policy. Accordingly, attorney fees
3 under *Olympic S.S.* are inappropriate. Therefore, there are no issues of material
4 fact in this case, and the Defendant is entitled to judgment as a matter of law.

5 Accordingly, **IT IS HEREBY ORDERED:**

6 1. The Defendant's Motion to Dismiss, **ECF No. 17**, is **GRANTED**.

7 2. The Plaintiff's claim for attorney fees under *Olympic S.S.* is

8 **DISMISSED WITH PREJUDICE.**

9 **IT IS SO ORDERED.**

10 The District Court Executive is hereby directed to enter this Order and to
11 provide copies to counsel.

12 **DATED** this 19th of October, 2011.

13
14 s/ Rosanna Malouf Peterson
15 ROSANNA MALOUF PETERSON
16 Chief United States District Court Judge
17
18
19
20